Discussion Paper
on
Western Alaska Community Development Quota (CDQ) Program: Community Eligibility

NPFMC
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I. Introduction

The following discussion paper was prepared at the request of the National Marine Fisheries Service (NMFS) to discuss various issues related to community eligibility in the Western Alaska Community Development Quota (CDQ) Program and to facilitate an analysis that will address the existing inconsistencies between Federal regulations, the Fishery Management Plan for the Groundfish Fishery in the Bering Sea and Aleutian Islands Area (FMP) and the Magnuson-Stevens Act (MSA).

In October 2000, NMFS received a letter challenging the 2001 - 2002 CDQ allocations recommended by the State of Alaska (State). This letter posed questions about the specific regulatory language pertaining to CDQ eligibility and, more generally, about the eligibility status of the some of the communities currently participating in the program. Currently, community eligibility criteria for participating in the CDQ Program is included in the MSA, the Bering Sea and Aleutian Islands Area (BSAI) FMP, and in Federal regulations.[1] The exact wording of the criteria differs among the three documents, which creates difficulty in interpreting the standards for an eligible community. The letter prompted NMFS to examine the consistency of Federal regulations at 50 CFR 679 relative to the CDQ Program eligibility criteria with the criteria established in the MSA. This effort included requesting a legal opinion from NOAA General Counsel (GC) to both identify existing inconsistencies and establish how to interpret and apply the criteria for community eligibility in the MSA. Based on that opinion, further efforts will include revising the Federal regulations to be consistent with the eligibility criteria in the MSA and re-evaluating the application of the eligibility criteria to ensure that all participating communities are eligible under the criteria listed in the MSA.

This paper represents a preliminary analysis of CDQ eligibility issues that will be subsequently developed into a formal Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) for Council review.

[1]Community eligibility regulations are found at 50 CFR 679.2, and a list of eligible communities is found in Table 7 to Part 679.

II. Background and Legal Opinion

Upon identification of issues associated with community eligibility, NMFS staff requested a legal opinion (see Attachment 1) from NOAA GC on how to interpret and apply the criteria for community eligibility in the MSA. This legal opinion was issued August 15, 2003, and was sent to the Council on August 21. The document provides legal guidance for interpreting the MSA criteria and the analytical approach recommended to mitigate any inconsistencies between these criteria and those in 50 CFR 679. The legal opinion also provides a comprehensive statutory and regulatory history of the development of the community eligibility criteria for the CDQ Program. Because the legal opinion is provided as an attachment to this paper, only a brief history is included here.

On November 23, 1992, NMFS published the final rule to implement the CDQ Program (57 CFR 54936). The final rule included a list of eligibility criteria, as well as a list of eligible communities that appeared to meet the criteria. The accompanying language required that the Secretary of Commerce (Secretary) review the State's findings to determine that each community either met the eligibility criteria *or* was listed on the table of eligible communities. This language is significant in that it did not require that the State and NMFS substantively determine a community's eligibility status using the criteria every allocation cycle. The language of the final rule implied that if a community was listed on the table (Table 7 in current regulations) it was automatically considered an eligible community for purposes of the CDQ Program and CDQ allocations (NMFS 2003, p.4). No further evaluation of the community's eligibility status would be necessary in the future.

In June 1996, NMFS issued a final rule that consolidated CDQ program regulations found in two separate regulations into Part 679. This action combined the pollock and the halibut/sablefish CDQ Program into one subpart, Subpart C, which contained a section with the criteria for community eligibility[2] (NMFS 2003, p. 5-6). The new language included the four eligibility criteria used in the original CDQ Program with regard to pollock allocations. Later that year, NMFS published a final rule adding Akutan to Table 7 as an eligible community, based on the Council's recommendation that the community did not have previously developed harvesting or processing capability sufficient to support substantial BSAI groundfish fisheries participation.[3] Table 7 (and the eligibility criteria) was amended to incorporate these changes, and the resulting table reflected the 57 communities that were eligible to participate in the CDQ Program at that time.[4]

In October 1996, the Sustainable Fisheries Act (SFA) amended the MSA, adding statutory language that establishes the Western Alaska CDQ Program (Section 305(I)). The Senate report accompanying the bill noted

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[2]50 CFR 679.30(d)(2)).

[3]Akutan was originally excluded because a large groundfish processing plant is located within the community. Akutan was eventually included when evidence was provided to indicate that the city of Akutan received little benefit from the plant.

[4]The 57 eligible communities listed as of 8/12/96 were: Atka, False Pass, Nelson Lagoon, Nikolski, St. George, St. Paul, Brevig Mission, Diomede/Inalik, Elim, Gambell, Golovin, Koyuk, Nome, Savoonga, Shaktoolik, St. Michael, Stebbins, Teller, Unalakleet, Wales, White Mountain, Alegnagik, Clark's Point, Dillingham, Egegik, Ekuk, Manokotak, Naknek, Pilot Point, Ugashik, Port Heiden/Meschick, South Naknek, Savonoski/King Salmon, Togiak, Twin Hills, Alakanuk, Chefornak, Chevak, Eek, Emmonak, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kotlik, Kwigillingok, Mekoryuk, Newtok, Nightmute, Platinum, Quinhagak, Scammon Bay, Sheldon's Point, Toksook Bay, Tununak, Tuntutuliak, Akutan.
There are three instances where communities are listed with two names separated by a slash. NMFS has treated these entries to be one community with alternate names.

that the SFA "would establish community eligibility criteria that are based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ Programs" (S. REP. No. 104-276, at 26 (1996)). The statute language includes a list of eligibility criteria, which differs slightly from that published in Federal regulations, and does not include a list of eligible communities. The community eligibility criteria in the MSA is provided in Attachment 2.

Subsequently, with the expansion of the CDQ Program to include a portion of all BSAI groundfish TACs, NMFS published two final rules implementing the multi-species CDQ amendment in 1998.[5] At that time, no substantive changes were made to the wording of the eligibility criteria and no changes were made to Table 7. Thus, the current definition of eligible community is that which was included in the final rule for the multispecies CDQ Program. **The current regulatory text at 50 CFR 679.2 is as follows:**

> *Eligible community means a community that is listed in Table 7 to this part or that meets all of the following requirements:*
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> *(1) The community is located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nautical miles of the baseline of the Bering Sea.*
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> *(2) That is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.*
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> *(3) Whose residents conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI.*
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> *(4) That has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The community of Unalaska is excluded under this provision.*

Finally, in April 1999, NMFS made a determination that an additional eight communities[6] were eligible for the CDQ Program, based on a recommendation and supporting documentation from the State.[7] This determination was made through a letter to the State (April 19, 1999), and these eight communities have been considered eligible for the program since that time. As noted previously, NMFS did not formalize this decision through rulemaking, nor did it amend Table 7, due to emerging questions of community eligibility. Thus, Table 7 still

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[5]Two final rules were published: 63 FR 8356, 2/19/98 and 63 FR 30381, 6/4/98.

[6]These communities are Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek.

[7]These eight communities were added when a NMFS review found that the original survey to draw the 50 mile limit was completed using statute, rather than nautical, miles. This extension of the geographic threshold to 50 nautical miles resulted in qualifying eight additional communities. These communities were required to meet all of the eligibility criteria in regulation.

includes only the 57 communities previously determined eligible through rulemaking in 1992 and 1996. However, the complete list of 65 communities that NMFS considers eligible through rulemaking and the 1999 administrative determination is provided in Attachment 3.

Legal Opinion on Consistency between MSA and Federal Regulations

The legal opinion issued by NMFS gives a complete background on the history of the regulatory and Congressional language establishing eligibility criteria in Federal regulations and the MSA. It also provides an opinion on whether and where consistencies exist between the criteria listed in Federal regulations and those listed in the MSA. The opinion confirms that under the rules of statutory construction, "the language of the statute is controlling and takes precedence over the language of an existing regulation if the regulation is not consistent with the statutory language." (NMFS 2003, p. 9). In addition, while an administrative agency has authority to interpret a statute, the deference afforded to an agency's interpretation does not apply when the agency's interpretation is in conflict with a legislative mandate. Thus, the opinion states the following:

> *"In October 1996, when the MSA was amended, Congress spoke to the issue of community eligibility and provided definable boundaries for community participation in the CDQ Program. And although Congress stated in the legislative history that the SFA would establish community eligibility criteria that are based upon those previously developed by the Council and NMFS, Congress did not use language that is identical to the regulatory eligibility criteria. Based on the rules of statutory construction outlined above, the eligibility criteria set forth in the MSA control and take precedence over the regulatory criteria set forth in 50 CFR §679.2 to the extent there is any conflict between the statutory and regulatory language. Additionally, because Congress has now specifically addressed the issue of community eligibility for the CDQ Program, NMFS's previous interpretation of the MSA as providing the Council and agency the ability to implement eligibility criteria consistent with the general provisions of the MSA cannot be maintained to the extent that the regulatory criteria are in conflict with the statutory language of the MSA." (p. 10).*

NOAA GC then provides a legal interpretation of the MSA eligibility criteria as well as a comparison of the statutory and regulatory language to determine whether inconsistencies or conflicts exist. This side-by-side comparison is presented in the legal opinion (Attachment 1) on pages 11-12. NOAA GC finds that some of the criteria in the MSA are considered substantively identical to the regulatory language. There is one criterion in regulation that requires amending for consistency purposes: the requirement that a community's residents conduct more than half of their commercial or subsistence fishing effort in the BSAI. In addition, there are two criteria that require points of interpretation. The interpretations of each of the criteria, and the approach that will be used to evaluate communities against these criteria, will be discussed later in this paper.

The most significant difference noted between the MSA statutory text and the Federal regulatory text is that there is no reference to Table 7 (i.e., a list of eligible communities) in the MSA. The language in the MSA clearly indicates that a community must satisfy all of the criteria listed in order to be eligible – there is no language that conveys discretion to the agency to modify, replace, or allow communities to participate that do not meet all of the criteria in the MSA. Thus, the current Federal regulations that allow a community to either meet the eligibility criteria *or* be listed on Table 7, are not consistent with the MSA. This discrepancy would not necessitate a change to the regulations per se, as long as all of the communities listed on Table 7 meet the statutory criteria.

In sum, the legal opinion finds inconsistencies within the eligibility criteria and language in Federal regulations

at 50 CFR 679 when compared to the criteria and language in the MSA. It concludes that the agency must revise the regulations to be consistent with the MSA, as there are substantive differences between the two texts. As a subsequent step to this approach, the agency must also re-evaluate the eligibility status of all 65 currently participating communities that were determined to be eligible both prior to and following the MSA amendment. The remainder of this paper discusses the approach being considered by NMFS to revise the regulations so they are consistent with the MSA, as well as the approach for re-examining all currently participating CDQ communities.

III. Problem statement

Given that there are differences in the specific language in Federal regulations and the MSA relevant to community eligibility in the CDQ Program, NMFS has determined that the regulatory criteria must be changed to be consistent with the MSA criteria. However, because the regulatory language directly affects the application of the criteria, it may also affect the resulting eligibility status of some of the currently participating CDQ communities. Thus, Table 7 also must be reviewed and perhaps modified to list only those communities that meet the eligibility criteria in the statute. Recognizing this potential effect, the primary problem to be addressed remains as follows:

> The BSAI FMP and NMFS regulations must be revised to be consistent with the MSA. The BSAI FMP (Section 13.4.7.2) and Federal regulations (50 CFR 679.2) contain community eligibility criteria for the CDQ Program. However the language is not exactly the same between these documents, nor do they match the community eligibility requirements that were added to the MSA in 1996 through the Sustainable Fisheries Act.
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> In addition, there are currently 65 communities that NMFS has determined are eligible to participate in the CDQ Program. Table 7 to 50 CFR 679 includes only 57 total communities: 56 that were determined eligible when the program was originally implemented in 1992 and 1 community (Akutan) that was added in 1996 through rulemaking. Eight additional communities were determined eligible in 1999 through an agency administrative determination that was not formalized through rulemaking, due to emerging questions of community eligibility. If Table 7 is to be used in Federal regulations to reflect eligible communities, it must contain a complete list of communities eligible for the CDQ Program under the criteria established in the MSA. It is uncertain whether all 65 currently participating communities meet these criteria.

Given the identified need to revise the community eligibility criteria in the FMP and regulations, the Council may want to further guide the analysis by approving a problem statement to that effect.

IV. Schedule & Product

The product planned for this action is an RIR/IRFA to support a BSAI FMP amendment and accompanying regulatory amendment.[8] Because the CDQ community eligibility criteria are listed in both the BSAI FMP and Federal regulations, they should be revised in both documents to be consistent with the MSA. The regulatory amendment that would revise the eligibility criteria, and potentially, the list of eligible communities, would have

[8] A categorical exclusion under the National Environmental Policy Act is being sought for this action.

to be effective by January 1, 2005, in order to be in place when the next CDQ allocation cycle begins. The CDQ groups, the State, and NMFS will need to know which communities are eligible prior to the development and evaluation of the groups' Community Development Plans (CDPs). The CDQ groups will start preparing their CDPs for the 2006 - 2008 allocation cycle in late 2004, and the entire allocation process is anticipated to take about twelve months.[9] Thus, in order to have a rule effective by January 2005, NMFS estimates that initial review of a draft analysis will need to occur at the February 2004 Council meeting, with final action in April 2004.

There is also an effort, external to the Council process, in which interested stakeholders are actively working to amend the MSA to clarify the question of which communities are eligible for the CDQ Program. While Congressional action is not guaranteed, Congress may act to clarify its intent on community eligibility. Should Congress take action on this issue, the FMP and regulatory amendments proposed to remedy the identified problem would be simplified, but not unnecessary. Under the proposed statutory changes discussed thus far, NMFS would still need to revise the FMP and Federal regulations to make the eligibility criteria consistent with that in the MSA. This is necessary not only for general consistency purposes, but also to clarify the criteria that would apply to any community applying for program eligibility in the future. The primary difference that may result from Congressional action is that a re-evaluation of each participating community may no longer be necessary. In that case, because the action would be much simplified, the schedule for final action may be more flexible.

NMFS has initiated this effort and raised the issue to the Council, despite the potential for Congressional action, in case no legislative solution occurs by the end of 2003. Given the concerns raised and the conclusions of the legal opinion, the agency must remedy the regulatory and statutory inconsistencies and ensure that all participating communities meet the eligibility criteria in the MSA prior to the next allocation cycle. The schedule for this potential action is thus driven by the upcoming allocation cycle and the need for a final rule effective by January 2005.

The remainder of this paper outlines the analytical approach *should no Congressional action be taken*, in essence, a plan to: (1) revise the eligibility criteria listed in the FMP and Federal regulations to be consistent with the MSA, and (2) undertake a review of each of the 65 currently participating communities' eligibility status to revise Table 7. This approach and the proposed alternatives for analysis could be revised, and the re-evaluation of eligible communities eliminated, should Congressional action occur.

V. Description of Alternatives

The following are two primary alternatives that would be considered in an analysis to resolve the identified problem.

Alternative 1: No action. Do not make any revisions to the BSAI FMP or Federal regulations (50 CFR 679).

Alternative 1 would not revise the eligibility criteria in the BSAI FMP and Federal regulations to be consistent

[9]The schedule of events that has occurred in past CDQ allocation cycles has generally taken nine months to complete, but inclusion of a formal appeals process in the next and future cycles may extend that timeframe by approximately three months.

with the eligibility criteria in the MSA. Alternative 1 also would not initiate a re-evaluation of the eligibility status of the 65 communities currently participating in the CDQ Program and would not make revisions to Table 7 in 50 CFR 679. Due to the concerns noted above, and the conclusions of NOAA GC stated in the legal opinion of August 15, 2003, selection of this alternative by the Council may result in a Secretarial amendment to revise the BSAI FMP and Federal regulations to be consistent with the MSA. Thus, while it is necessary to include a no action alternative for analysis, it is uncertain whether this represents a viable alternative for selection by the Council.

Alternative 2: Amend the BSAI FMP and revise Federal regulations (50 CFR 679) to make the eligibility criteria consistent with that provided in the MSA.

There are five elements to Alternative 2, as follows:

- Revise the BSAI FMP so the eligibility criteria are the same as those listed in the MSA.
- Revise NMFS regulations (50 CFR 679) so the eligibility criteria are the same as the criteria listed in the MSA.
- Revise Table 7 to 50 CFR 679 to list all communities that are eligible for participation in the CDQ Program under the criteria in the MSA. This necessitates re-evaluating all 65 currently participating communities to determine each community's eligibility status under MSA criteria. During each CDQ application and allocation cycle, NMFS will determine whether each community that is part of a CDP is listed on Table 7.
- Establish the process in Federal regulations by which communities not listed on Table 7 can apply and be evaluated for eligibility in the CDQ Program.
- Clarify that rulemaking is necessary to amend Table 7 in the future. Table 7 would only be amended if the eligibility status of a community changed relative to the criteria listed in the MSA, or if a new community were found eligible.

VI. Approach to Alternative 2

This section describes each of the provisions proposed as part of Alternative 2 (bulleted items above), and the preliminary approach that would be taken in the analysis.

Revisions to the BSAI FMP and Federal regulations

Given that there are differences in the specific language in Federal regulations and the MSA relevant to community eligibility in the CDQ Program, NMFS has determined that the regulatory criteria must be changed to be consistent with the MSA criteria. The NOAA GC legal opinion concludes that not all of the criteria in regulation differ substantively from that in the MSA, thus not all of the criteria need to be modified. **However, in order to provide clarity for current and future use of the criteria, staff recommends making the current eligibility criteria in the BSAI FMP and Federal regulations identical to those listed in the MSA.**

Even if there are no significant differences in the interpretation of the wording of the various criteria, having the same exact criteria in each document will provide clarity and consistency in both understanding and

applying those criteria for participation in the CDQ Program. Attachment 4 provides the proposed changes to the BSAI FMP text that would be necessary to ensure consistency with the MSA eligibility criteria, as well as some modifications that would clean up the FMP language without making substantive changes.

In addition, the following represents draft regulatory language which would (1) revise the current definition of eligible community at 50 CFR 679.2, and (2) modify the eligibility criteria as appropriate and include it at 50 CR 679.30. These changes would result in the exact same wording of the community eligibility criteria in the MSA, Federal regulations, and the BSAI FMP. (For comparison, the current regulatory language establishing the eligibility criteria is located at 50 CFR 679.2 and provided on page 3 of this paper.)

§ 679.2 Definitions.

Eligible community means:

(1) For purposes of the CDQ Program, a community that is listed in Table 7 to this part. A community will be listed in Table 7 if it has met all of the criteria specified in § 679.30(X).

§ 679.30 General CDQ regulations.

(X) Eligible Communities.

The communities that NMFS has determined meet the following eligibility requirements are listed in Table 7 to this part. Any community that meets the following eligibility criteria, but is not listed in Table 7, may apply to NMFS to request a determination about its eligibility for the CDQ Program. NMFS will consult with the State of Alaska and the Council in making its determinations about eligibility. A community is not eligible to participate in the CDQ Program unless it is listed in Table 7. To be eligible to participate in the CDQ Program, a community shall:

(1) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea;

(2) not be located on the Gulf of Alaska coast of the north Pacific Ocean;

(3) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;[10]

(4) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village;

(5) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands; and

[10]This criterion is included so that eligibility criteria in Federal regulations exactly match those in the MSA. It is somewhat redundant with the proposed introductory text to 50 CFR 679.30(X) and may not be included in the actual action to amend Federal regulations. Should further interpretation of this criterion find that it requires a community to meet eligibility requirements other than those specifically listed in the MSA, NMFS will clarify the meaning of this criterion in the analysis and rulemaking associated with this action.

(6) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments.

Re-evaluating community eligibility status

NOAA GC also concludes that some of the MSA criteria for community eligibility are substantively different from the regulatory criteria contained within the definition of eligible community at 50 CFR 679.2. Therefore, all 65 communities that NMFS has determined to be eligible for the CDQ Program must be re-evaluated using the MSA criteria. Following this evaluation, Table 7 must be revised to contain only those communities that are eligible under those criteria. This section will describe each of the eligibility criteria listed in the MSA, which would replace the current criteria in Federal regulations under Alternative 2.

The approach used in this section is to: (1) identify each specific MSA criterion; (2) state whether the legal opinion concluded that there was a substantive difference between the regulations and the MSA with regard to each criterion; and 3) describe the legal interpretation of each criterion and how it will be applied to the 65 communities. In cases in which the criterion is fairly straightforward (e.g., geographic and the Alaska Native Claims Settlement Act (ANCSA) related criteria), some preliminary information has been provided regarding the eligibility status of the 65 currently participating communities. However, much of the re-evaluation of communities will be deferred to the initial draft analysis, and all of the following information will be developed in further detail.

The following MSA community eligibility criteria for the CDQ Program (listed in italics) is from the statutory text at 16 U.S.C. 1855 (i)(1)(B).

Geographic criteria

(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea;

(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean;

NOAA GC conclusion: current regulations are substantively identical to MSA criteria
Preliminary evaluation of current communities: no indication at this time that eligibility status will change

The two criteria above are listed separately in the MSA but are grouped together for discussion purposes because together they make up the geographic criteria relevant to community eligibility. NOAA GC has concluded that the statutory language is substantively identical to the regulatory language. Thus, under Alternative 2, while the wording would be changed in regulations to exactly match the wording provided above, there would be no effect on the interpretation of either criterion as previously applied. As stated in the legal opinion, the language is clear and unambiguous and there is no need for further interpretation.

Concerning the eligibility status of the current communities participating in the CDQ Program, all 65 communities are eligible under the geographic criteria above. NMFS made this determination for 56 communities in 1992, for Akutan in 1996, and for the eight additional communities included in 1999. A NOAA

geographer concluded this determination for the eight additional communities in 1998 using location data provided by the State (Romesburg letter, 1998). This effort included a review of 44 additional communities that were within 100 nm of the Bering Sea coast. In 1999, NMFS determined that eight of these communities met the geographic (within 50 nm) and all other criteria.[11] The remaining communities were either unpopulated, did not meet the 50 nm criterion, north of the Bering Strait, or located on the Gulf of Alaska.

Consistency with regulatory provisions criterion

(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;

NOAA GC conclusion: not included in current regulations, but regulations are not inconsistent with MSA
Preliminary evaluation of current communities: no indication at this time that eligibility status will change

This criterion is included in the statutory eligibility criteria but is not in current Federal regulations. It appears to require that communities meet the regulatory criteria that is developed by the State and NMFS in order to be eligible, which may be redundant with the introductory text that states that to be eligible, a community must meet all of the criteria listed. This criterion may also allow for additional eligibility criteria to be established for the CDQ Program. While the overall intent of Alternative 2 is to revise the eligibility criteria in the FMP and Federal regulations to match that in the MSA, further interpretation of this criterion is necessary to understand its application. Due to the existing uncertainty surrounding the interpretation of this criterion, staff has requested further advice from NOAA GC.

ANSCA status criterion

(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native Village;

NOAA GC conclusion: current regulations are substantively identical to MSA criterion
Preliminary evaluation of current communities: at least one community does not appear to meet this criterion

This criterion addresses whether a potential community has been determined and certified to be a Native village under ANCSA. NOAA GC found that the statutory language requiring ANCSA certification is also clear and unambiguous and there is no need for further interpretation. Thus, based on the previous conclusion that all communities must meet the plain language of the statute to be eligible, each community must be reviewed to ensure that all eligible communities are certified as Native villages under ANCSA.

With regard to the ANCSA status of the 65 currently participating CDQ communities, only King Salmon/Savonoski does not appear to be certified as a Native village under ANCSA. "Native village" has a specific definition in ANCSA under 43 U.S.C. 1602(c):

"'Native village' means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary

[11] Several other communities were determined to be located within the 50 nm criterion but were apparently unpopulated in 1999. These communities were: Bill Moore's Slough, Chuloonawick, Council, Hamilton, King Island, Mary's Igloo, Paimiut, Solomon, and Umkumiute.

determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives; (Emphasis added)*"*

The statute provides a list of communities (sections 1610 and 1615) that may be determined to be Native villages for the purposes of receiving land entitlements under ANCSA, with the condition that the Secretary of the Interior make a determination that each of the communities listed actually meet the criteria. This is clear from the language that states that the community must be listed and be determined by the Secretary of the Interior to be composed of 25 or more Native peoples in 1970.

In addition, the statutory language provides for other communities, not listed in Sections 1610 or 1615, to be certified as Native villages, should they meet the requirements of the chapter and be determined by the Secretary of the Interior to be composed of 25 or more Native peoples in 1970. Thus, the list of Native villages provided in the statute was not intended to be static and final; the Secretary of the Interior must make a determination about each community on the list as to whether it meets the definition of Native village, as well as review evidence provided from communities not on the list regarding their status as a Native village. The Federal regulations governing the eligibility requirements under ANCSA and implementing the process for reviewing Native villages is found at 43 CFR 2651.2.[12]

Since ANCSA was established, the list of certified Native villages pursuant to the ANCSA criteria has changed according to the process described above. Several communities listed in the Act were found by the Secretary of the Interior not to meet the definition of a Native village established in the Act, and several communities not listed in the Act received certification as Native villages after providing sufficient evidence to that fact. The Department of Interior confirmed in writing, and again recently through personal communication, the list of ANCSA certified Native villages to-date.[13]

As noted in the legal opinion, King Salmon was not an ANCSA certified Native village at the time of the CDQ final rulemaking, yet King Salmon/Savonoski has been included on Table 7 as an eligible CDQ community since 1992. During Council deliberations at that time, King Salmon was noted as pursuing, but had not yet received, certification as a Native village with the Department of the Interior. While the intent described during the Council discussion was that King Salmon would be added to the list of eligible communities should it receive certification, the final Council motion did not reflect that condition. In the final motion, King Salmon was paired with Savonoski and added to the table of eligible communities.[14] The Council deliberations also

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[12]Federal (Bureau of Land Management) regulations further define the eligibility criteria for villages to receive benefits under ANCSA at 43 CFR 2651.2. In the case of villages not specifically listed in ANCSA, not only must there be 25 or more Native residents of the village, but there must be a Native majority in order to be eligible.

[13]Letter to Sally Bibb, NMFS, from Joe LaBay, U.S. Dept. of the Interior, Bureau of Land Management, June 8, 1999; email to Sally Bibb from Joe LaBay, dated July 22, 2003; and personal communication with Nicole Kimball, August 6 and August 7, 2003.

[14] Some of the factors that may have led to King Salmon being added to Savonoski were it's proximity to, and shared cultural history with, Savonoski, as well as the belief that Savonoski was ANCSA certified. King Salmon and Savonoski are two separate communities in the Katmai region of southwestern Alaska, several miles apart. "Old Savonoski" was located near the east end of the Iliuk Arm of Naknek Lake until 1912, when Mt. Katmai erupted and forced the residents of Savonoski to abandon their village site. Finding their former site uninhabitable, former Savonoski villagers eventually established "New Savonoski," located along the south bank of the Naknek River and about five miles east of Naknek (Historic Resource Study of Katmai National Park and Preserve, 1999). Over the years, residents of New Savonoski were forced to abandon the new site

mention that Savonoski is an ANCSA-certified Native village (Transcript of Council deliberations, 4/23/92, p.1-2).

According to the legal opinion, NMFS must determine whether the communities represented by the CDQ groups meet the eligibility requirements listed in the MSA, and can no longer deem a community eligible by virtue of the fact that it is listed on Table 7. The Department of Interior has recently confirmed that King Salmon has not received ANCSA certification as a Native village, thus, it does not meet all of the statutory criteria.[15]

In addition, Savonoski is also not certified under ANCSA as a Native village. While Savonoski was originally listed in Section 1610 as a (potential) Native village to receive benefits under ANCSA, the Department of Interior determined that it was not a Native village by virtue of the fact that it did not meet the population criteria specified in the Act (25 or more Native peoples according to the 1970 U.S. Census or other satisfactory evidence). Not only did Savonoski not qualify for status as a "Native village" under ANCSA, the Department of Interior determined on June 20, 1983, that it did not qualify as a "Native group" (IBLA decision memo 83-951, 4/30/84). ANCSA authorized smaller land conveyances to qualified "Native groups," which were defined as "any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who compromise a majority of the residents of the locality (Emphasis added)" (43 U.S.C. 1602(d)).[16] Thus, the population threshold to be certified as a Native group under ANCSA is lower than that required for certification as a Native village. According to the Department of the Interior, Savonoski did not meet either of these thresholds.

Savonoski, Inc., appealed to the Interior Board of Land Appeals (IBLA) regarding the original determination to issue a certificate of ineligibility for status as a Native group by the Bureau of Indian Affairs, and the IBLA upheld the ineligibility determination on April 30, 1984 (IBLA decision memo 83-951, 4/30/84). The Department of the Interior has recently confirmed that Savonoski has not received ANCSA certification as a Native village (or Native group) since that time, thus, it does not appear to meet all of the statutory criteria (D. Hopewell, pers. comm.).

King Salmon/Savonoski has been treated as one community in the CDQ Program to-date, which is why at least "one" community would likely be deemed ineligible under this criterion as a result of the pending RIR/IRFA on eligible communities. The research completed thus far indicates that the remaining 64 participating

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due to erosion of the riverbank, and the villagers further dispersed across the region.

[15]Although King Salmon did not receive certification as a Native village under ANCSA, the King Salmon Tribe became a Federally-recognized entity as of December 29, 2000. This means that the community met a list of criteria for Federal recognition of status as an Indian tribe and, by virtue of that status, can receive services from the U.S. Bureau of Indian Affairs (67 FR 46327, July 12, 2002). (K. Feldman, pers. comm.)

[16]The implementing BLM regulations further define a Native group under 43 CFR 2653.0-5©) and 43 CFR 2653.6 (5). The definition under 43 CFR 2653.0-5(c) is: "Native group means any tribe, band, clan, village, community or village association of Natives composed of less than 25, but more than 3 Natives, who comprise a majority of the residents of a locality and who have incorporated under the laws of the State of Alaska." 43 CFR 2653.6(5) expands on this definition, requiring, among other things, that the community must be composed of more than a single family or household.

communities are certified Native villages under ANCSA.[17]

Current fishing effort criterion

(v) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian islands;

NOAA GC conclusion: inconsistency exists between MSA and current regulations; interpretation necessary to define "current"
Preliminary evaluation of current communities: incomplete at this time

NOAA GC recommends modifying the regulatory language to be consistent with the MSA language regarding this criterion. Among the issues is the fact that the regulatory language references fishing effort "in the waters of the BSAI," as opposed to the MSA language which states "in the waters of the Bering Sea or waters surrounding the Aleutian islands." NOAA GC notes that the "BSAI" has a specific definition in regulation, referring only to waters in the Exclusive Economic Zone (EEZ)(3-200 miles), which excludes State waters (0-3 miles). By contrast, the legal interpretation of subsistence fishing is that it cannot come from the EEZ (NMFS 2003, p. 15). NOAA GC concludes Congress intended both commercial harvests and subsistence harvests should be used to satisfy this criterion. Therefore, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must include harvests from both State and Federal waters. Due to the potentially substantive discrepancy between the regulatory and statutory language, in which the regulations might be interpreted to exclude State waters, Federal regulations must be revised to be consistent with the MSA. However, although this inconsistency exists, in practice, NMFS may have applied this criterion as mandated by the MSA language in the past. See the legal opinion for more detail on this issue.

The second point of interpretation from NOAA GC is in regard to the application of the word "current" when referring to fishing effort. NMFS has interpreted and applied the word "current" to mean the level of a community's commercial or subsistence harvests at the time of initial evaluation for eligibility. If the community's harvests satisfied the criterion at the time they were initially evaluated for eligibility, then the community was determined to have satisfied the criterion in perpetuity and no further consideration was required by NMFS (NMFS 2003, p. 17). NOAA GC concludes that because the statutory language is ambiguous on this point, NMFS was permitted to develop a reasonable interpretation of the term, and did so. Thus, with the deference afforded to the agency to interpret the term, and the way the agency has applied the criterion in the past, it follows that NMFS will continue to interpret the term as meaning fishing effort during the time the community was or is initially considered for eligibility. Once determined to have met the criterion, it would satisfy the criterion thereafter. This means that a community that may apply for eligibility in the future would be evaluated on the basis of its fishing effort at the time of its evaluation, and not as of the date the MSA criteria were published or any other point in time.

The two interpretations discussed above will guide the re-evaluation of all 65 CDQ communities. The re-

[17]Note that the CDQ communities of Savoonga, Gambell, and Elim opted to acquire title to reserve lands under Section 19(b) of ANCSA, acquisition of which precludes receiving any other benefits under the statute. However, only "Village Corporations" located within a reserve defined in the statute were eligible to take advantage of this option. Village Corporations, by definition in the statute (43 U.S.C 1602(j)), must be representative of a "Native Village." Thus, Savoonga, Gambell and Elim, while selecting reserve lands, are certified as Native villages under the statute.

evaluation of communities' eligibility status under this criterion has not yet been undertaken, but must be part of the draft analysis to support an FMP and regulatory amendment. Each community will be evaluated based on the approach outlined above (i.e., communities that applied prior to 1992 will be evaluated based on fishing effort in the Bering Sea and waters surrounding the Aleutian Islands at that time, communities that applied in 1998-1999 will be evaluated based on fishing effort at that time). It is anticipated that this will be a significant portion of the overall effort to review the communities' eligibility status.

Previously developed harvesting or processing capability criterion

(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments.

NOAA GC conclusion: current regulations are substantively identical to MSA criterion
Preliminary evaluation of current communities: incomplete at this time

NOAA GC concludes that the statutory language is relatively clear and unambiguous, and is not substantively different from the regulatory text. While the statute references the Bering Sea, the regulations reference participation in the BSAI; however, this is not deemed an inconsistency because it does not result in a substantive difference. The legal opinion states: "...the statutory term "Bering Sea" includes waters directly north of the Aleutian Islands. Due to the FMP management area divisions between the Bering Sea and Aleutian Islands, the regulatory text must reference both areas in order to encompass the same area." (p. 19, NMFS memo). The regulatory text also specifically mentions the exclusion of Unalaska, while the statute does not. This is not deemed inconsistent with the statute, however, as it is not necessary to state explicitly in order to uphold this community's ineligibility status.

The re-evaluation of the CDQ communities will be guided by the same interpretation of this criterion as has been used in the past. The review under this criterion has also not yet been completed, but will be part of the draft analysis.

Process for future amendments to Table 7

Review of eligible communities on Table 7
Lastly, the mechanism for and timing of evaluating community eligibility and amending Table 7 in the future needs to be clarified. Under current regulations, NMFS is responsible for determining whether the communities represented in the CDPs are eligible, either by meeting the eligibility criteria in section 50 CFR 679.2 or by being listed on Table 7. As discussed previously, Alternative 2 would modify the regulations to eliminate the "either/or" situation, and require that all communities listed on Table 7 meet the eligibility criteria as currently listed in the statute. The question that remains is whether communities are listed on Table 7 indefinitely, or whether they must be reviewed to meet the eligibility criteria at the beginning of each new CDP cycle.

There are five basic criteria to consider, but only one that is truly relevant to this question. A community's eligibility status with respect to the geographic, 50 nm , or ANCSA-related criteria (criteria (i), (ii), (iv)) is unlikely to change over time, so a community will likely need to meet these thresholds only once.[18] Criterion (v), which addresses whether a community has previously developed harvesting or processing capability, is relative to a point in time previous to the community's inclusion in the CDQ Program. Thus, it is not logical to require a community to meet this criterion at any time other than the initial application and evaluation period.

The timing question is most relevant to criterion (iv), which addresses current fisheries participation. As

[18]Note that criterion (iii) requires that the community meet the criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal register. Thus, this criterion is not relevant to the question at hand.

discussed previously, NOAA GC determined that NMFS's past interpretation with regard to the current harvests criterion was reasonable, in that a community is evaluated on the basis of its harvests at the time of initial evaluation for eligibility. Should the community meet this criterion at that time, it does not need to be subsequently reviewed on this basis. Given this rationale, the intent of Alternative 2 is that if a community met all of the MSA criteria and was listed on Table 7, NMFS would not need to periodically re-evaluate a community's eligibility status in the future with regard to the MSA criteria. **During each CDQ application and allocation cycle, NMFS would only determine whether each community that is part of a CDP is listed on Table 7.**

Should NMFS need to add or remove a community from Table 7, however, rulemaking would be necessary to effect this change. Part of the regulatory revision explicit in Alternative 2 is to clarify that rulemaking is necessary to amend Table 7 in the future, and **Table 7 would only be amended if the status of a community changed relevant to the eligibility criteria listed in the MSA or a new community was added.** Despite meeting all of the criteria, a community could not participate in the program unless it was listed on Table 7, and a community would need to apply to NMFS for a determination of eligibility. The likelihood of a community's status relative to the MSA criteria changing *after* initial evaluation is relatively low. However, should there be a change in the future, rulemaking would be necessary to remove that community from Table 7.

Unpopulated communities on Table 7

While the criteria discussed above are the only explicit criteria established in the MSA, there is also an implicit recognition that a community must be populated in order to meet the criteria initially to be determined eligible and to meet the requirements in the CDP during each new allocation cycle. While the term "community" is not defined in the statute or accompanying Federal regulations, the statutory eligibility criteria requires that a community must be inhabited, through the condition that a community must *"consist of residents*" who conduct the majority of their fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands (criterion (v)). Thus, while it is not a separate, explicit criterion, the fact that a community must have a population is encompassed in criterion (v) and is a rational expectation in the context of the program. In order for a community to meet all of the MSA eligibility criteria to participate in the CDQ Program initially, it must have residents whose actions and operations attempt to meet the criteria.

In addition, specific requirements for approval of a CDP necessitate that: (1) the community's governing body provide a letter of support for the CDQ group,[19] and (2) one member from each represented community be included on the Board of Directors for the CDQ group.[20] In order to fulfill those requirements, it is implicit that the community be inhabited. Because future CDQ allocations are not guaranteed upon expiration of a CDP, the regulations state that a CDQ group must re-apply for subsequent allocations on a competitive basis.[21] Thus, the provisions above are required to be fulfilled in each new CDP that is submitted for a specific allocation cycle.

Given that a community must be populated in order to meet the eligibility criteria to be listed on Table 7, the

[19] 50 CFR 679.30(a)(1)(v)

[20] 50 CFR 679.30(a)(2)(iv)

[21] 50 CFR 679.30(a)

issue remains as to the process undertaken if a community on Table 7 becomes uninhabited.[22] As stated previously, Table 7 would only be amended if the status of a community changed relative to the eligibility criteria listed in the MSA. Thus, should an eligible community become uninhabited, staff proposes that it would not be removed from Table 7.

A community must have been populated in order to be able to meet the criteria at the time of initial evaluation, but there is no statutory requirement that the community must maintain a population to continue to meet the MSA criteria. However, because it would be relatively difficult, if not impossible, for a CDQ group representing an unpopulated community to meet all of the requirements of the general CDQ application procedures, an uninhabited community would not be able to participate in the next CDQ application and allocation cycle. Because the community would remain on Table 7, however, it would be eligible to participate in the program via inclusion in a CDP should the community become re-inhabited at some point in the future.

Adding new communities to Table 7

Another potential scenario is that a new community may apply to NMFS for eligibility to participate in the CDQ Program. It would then be evaluated for eligibility by the State and NMFS, in consultation with the Council. The legal opinion concludes that the plain language of the MSA at section 305(i)(1)(B) states that any community that meets the eligibility criteria in (i) through (vi) is an eligible community for purposes of the CDQ Program. There is no language that constrains the program to only a subgroup of communities that meet the criteria or the existing 65 participating communities. Thus, new communities are not prevented by the statute from applying for inclusion in the program. Consistent with the conclusions throughout this paper regarding the application of the criteria, a new community applying for eligibility would be evaluated based on the information provided at the time of its initial evaluation. If it were found to meet the eligibility criteria set forth in the MSA, it would be added to Table 7 through rulemaking. This concept is included in the proposed regulatory language under Alternative 2.

NMFS reviewed all communities that met the ANCSA status as a Native village (criterion iv) that were within the 50 nm boundary from the Bering Sea coast and not located on the Gulf of Alaska coast (criteria i and ii). Two communities were identified for which the 2000 U.S. Census has reported populations, but have not applied for inclusion in the program: Paimiut (pop. 2) and Solomon (pop. 4). While these communities did not report populations in years past, and it is unknown whether they would meet the remaining eligibility criteria, they provide an example of the type of situation in which a new (previously uninhabited) community may apply for inclusion in the program.

VII. Summary

This paper was prepared as a preliminary analysis of community eligibility issues in the CDQ Program to facilitate development of a formal RIR/IRFA to support an FMP and regulatory amendment. NOAA GC has issued a legal opinion which identifies inconsistencies between the CDQ community eligibility criteria established in Federal regulations, the BSAI FMP, and the MSA. This opinion also provides guidance regarding the interpretation and application of the criteria for community eligibility in the MSA.

Based on the legal analysis provided by NOAA GC, NMFS must identify an approach to rectify the existing

[22]Currently, there are two CDQ communities with relatively low populations according to the 2000 U.S. Census: Ekuk (pop. 2) and Ugashik (pop. 11). See Attachment 3 for the population data for all CDQ communities.

inconsistencies between the Federal regulations implementing the CDQ Program and the MSA. This paper proposes two primary alternatives to be analyzed in an RIR/IRFA for Council review. The action alternative (Alternative 2) in this amendment package would:

- revise the BSAI FMP and Federal regulations at 50 CFR 679 to match the eligibility criteria in the MSA;
- revise Table 7 to 50 CFR 679 to list all communities that meet the eligibility criteria in the MSA;
- require that only communities listed on Table 7 would be eligible to participate in the CDQ program;
- establish a process by which new communities could apply for eligibility; and
- clarify that rulemaking is necessary to amend Table 7 in the future.

As part of the regulatory changes necessary to be consistent with the MSA under Alternative 2, NMFS will need to re-evaluate all 65 currently eligible CDQ communities and amend Table 7 to list only communities that meet all of the statutory criteria. This paper evaluates the communities' status against the geographic and ANCSA-related criteria, and concludes that King Salmon/Savonoski does not meet the requirement that a community must be a certified Native village under ANCSA. The remaining criteria (current harvests and previously developed harvesting or processing capability) will be evaluated for the initial review draft of the analysis. While only two primary alternatives are proposed, the Council may determine that additional alternatives are necessary or desirable for analysis.

The CDQ groups will start developing new CDPs in late 2004, in preparation for the upcoming CDQ allocation cycle (2006-2008). In order to plan and develop a CDP to support their CDQ allocation requests, the CDQ groups must know which communities are eligible. In order to have a final rule by January 2005, NMFS estimates that initial review of a draft analysis will need to occur at the February 2004 Council meeting, with final action in April 2004. Should Congress take action to make the 65 currently participating communities permanently eligible for the CDQ Program, FMP and regulatory amendments would still be necessary to make the eligibility criteria consistent with those in the MSA. However, depending upon the direction of Congressional action, the re-evaluation of eligible communities may become unnecessary.

Attachments:

1. NOAA GC legal opinion dated August 15, 2003
2. Magnuson-Stevens Act, Section 305
3. List of 65 eligible communities and population
4. Draft BSAI FMP revisions

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Attachment 1

August 15, 2003

MEMORANDUM FOR: Dr. James W. Balsiger
Administrator, Alaska Region

THROUGH: Lisa L. Lindeman
Alaska Regional Attorney

FROM: Lauren M. Smoker
Attorney, Alaska Region

SUBJECT: Interpretation of Magnuson-Stevens Fishery Conservation and Management Act (MSA) language concerning community eligibility in the Western Alaska Community Development Quota (CDQ) Program

By memorandum dated June 13, 2003, you requested "written legal advice about how to interpret and apply the criteria for community eligibility in the MSA." *See* Attachment 1. The following memorandum provides our legal opinion on the various questions you posed as well as an opinion on your preferred interpretation.

This memorandum initially presents a review of the regulatory and statutory development of the eligibility criteria used in the CDQ program. It then presents a brief summary of the applicable legal standards to be applied when interpreting statutory and regulatory language. These standards are then applied on a paragraph-by-paragraph basis to the statutory language and a legal interpretation of the statutory eligibility criteria is presented, followed by a comparison of the statutory language to the regulatory language to determine whether there are inconsistencies between the two such that some action on the part of NMFS is necessary to correct an identified inconsistency. A final section summarizing the findings of this legal analysis is provided at the end of this memorandum.

Statutory and Regulatory History of the Community Eligibility Criteria for the CDQ Program

In March 1992, the Secretary of Commerce approved Amendment 18 to the Bering Sea and Aleutian Islands Area (BSAI) Fishery Management Plan (FMP) that, among other things, allocated one half of the BSAI pollock reserve, or 7.5% of the total allowable catch (TAC) of pollock, to eligible communities in western Alaska.[23] NMFS proposed regulations to implement the western Alaska CDQ program in October 1992 (57 *Fed. Reg.* 46139; October 7, 1992). The proposed rule stated the following concerning eligible communities:

> The CDQ program was proposed to help develop commercial fisheries in western Alaska communities. These communities are isolated and have few natural resources with which to develop their economies. Unemployment rates are high, resulting in substantial social problems. However, these communities are geographically located near the fisheries resources of the Bering Sea, and have the possibility of developing a commercial fishing industry. Although fisheries resources exist adjacent to these communities, the ability to participate in these fisheries is difficult without start-up support. This CDQ program is intended to provide the means to start regional commercial fishing projects that could develop into ongoing commercial fishing industries.

Id., at 46139. In order to identify eligible communities, four eligibility criteria were proposed which had been developed by the Governor of the State of Alaska (Governor), in consultation with the North Pacific Fishery Management Council (Council):[24]

> Prior to approval of a [Community Development Plan] recommended by the Governor, the Secretary will review the Governor's findings as to how each community(ies) meet [sic] the following criteria for an eligible community:
> (i) For a community to be eligible, it must be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the Gulf of Alaska coast of the North Pacific Ocean even if it is within 50 nautical miles of the baseline of the Bering Sea.
> (ii) The community must be certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.
> (iii) The residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea.
> (iv) The community must not have previously developed harvesting or processing capability sufficient to support substantial fisheries participation in the BSAI, except if the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this

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[23] *See generally,* Final Rule implementing Amendment 18 to the BSAI FMP, 57 *Fed. Reg*. 23321, June 3, 1992. Amendment 18 was effective through December 31, 1995.

[24] 57 *Fed. Reg.* 46139, 46140, Oct. 7, 1992.

provision.

Id., at 46144 (proposed section 675.27(d)(2)). Under the proposed rule, prior to approval of the Governor's recommendations for approval of Community Development Plans (CDPs) and CDQ allocations of pollock, the Secretary was required to review the Governor's findings to determine if the eligibility criteria had been met by the communities submitting CDPs. *Id.* The proposed rule also included a table that listed the communities that were determined by the Secretary to have met the proposed criteria.[25] *Id.*, at 46145. Finally, the preamble of the proposed rule made it clear that the communities eligible to apply for CDQ allocations of pollock were not limited to those communities listed in the table. *Id.*, at 46140.

A final rule implementing the CDQ Program was published on November 23, 1992.[26] (57 *Fed. Reg.* 54936) Based on public comment, four changes were made to the proposed eligibility criteria in the final rule, two of which are important for this analysis.[27] First, the proposed regulation at 675.27(d)(2) and the heading for Table 1 were changed to require the Governor and Secretary to make findings on the eligibility of a community only if it is not listed on Table 1 (emphasis added). *Id.*, at 54938. The preamble states that this change was made because the State submitted an evaluation of the list of communities in Table 1 against the community eligibility criteria at 675.27(d)(2) that concluded that the communities listed in Table 1 met the

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[25]The following 56 communities were listed in proposed Table 1:
Atka, False Pass, Nelson Lagoon, Nikolski, St. George, St. Paul, Brevig Mission, Diomede/Inalik, Elim, Gambell, Golovin, Koyuk, Nome, Savoonga, Shaktoolik, St. Michael, Stebbins, Teller, Unalakleet, Wales, White Mountain, Alegnagik, Clark's Point, Dillingham, Egegik, Ekuk, Manokotak, Naknek, Pilot Point/Ugashik, Port Heiden/Meschick, South Naknek, Sovonoski/King Salmon, Togiak, Twin Hills, Alakanuk, Chefornak, Chevak, Eek, Emmonak, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kotlik, Kwigillingok, Mekoryuk, Newtok, Nightmute, Platinum, Quinhagak, Scammon Bay, Sheldon's Point, Toksook Bay, Tununak, Tuntutuliak.
There are four instances where communities are listed with two names separated by a slash. In one instance, the entry represents two separate communities (Pilot Point and Ugashik are separate, ANCSA-certified native villages). For Diomede/Inalik and Port Heiden/Meschick, NMFS has treated these entries to be one community with alternate names. The status of the Savonoski/King Salmon entry is discussed in detail within this memorandum.

[26]This final rule implemented the CDQ program for 1992 and 1993. A subsequent regulatory amendment implemented the CDQ program for 1994 and 1995 (58 *Fed. Reg.* 32874, June 14, 1993). The subsequent regulatory amendment made no changes to the criteria for community eligibility.

[27]The following two changes are somewhat less relevant for the purposes of this analysis: (1) language in proposed section 675.27(d)(2)(iv) was changed from "substantial fisheries participation" to "substantial groundfish fisheries participation" to precisely reflect the intent of the Council (*see* Comment 4 and Response, 57 *Fed. Reg.* 54936, 54938), and (2) in response to a comment requesting inclusion of Akutan, King Cove, and Sand Point as eligible communities, NMFS responded that the Council intended the benefits of the CDQ program to be limited to communities within a specific geographical area of western Alaska and that do not have substantial groundfish harvesting or processing capability – because Akutan has a large groundfish processing plant, and King Cove and Sand Point are located on the Gulf of Alaska, these communities were not included as eligible communities (*see* Comment 12 and Response, *Id.*, at 54939).

criteria. *Id.*

This change has great importance for this analysis for two reasons. First, it removed the requirement that the State and NMFS substantively determine a community's eligibility status using the four eligibility criteria every CDQ allocation cycle. Under the final regulation, if a community was listed on Table 1, it was automatically considered an eligible community for purposes of the CDQ program and CDQ allocations. Second, this change made King Salmon an eligible community even though King Salmon was not a community that was certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (ANCSA) (43 U.S.C. 1601 et seq.) to be a native village.[28] During Council deliberations on the CDQ program, the ANCSA certification status of King Salmon was discussed. The Council recognized that King Salmon was not an ANCSA-certified village, but that King Salmon was pursuing certification as a native village with the Department of the Interior. The Council meeting transcript reflects that on April 22, 1992, the Council decided that when it received notification of King Salmon's certification, Table 1 would be amended to include King Salmon. However, the following day, that condition for the village's participation in the program was not reflected in the final motion passed by the Council, which simply read "...that King Salmon be added to Savonoski." Transcript of Council deliberations on April 23, 1992; North Pacific Fishery Management Council Minutes for the 101st Plenary Session, April 22-26, 1992, page 10. Paired with Savonoski, King Salmon was added to the list of CDQ eligible communities on Table 1 in the regulations.

The second important change was to proposed section 675.27(d)(2)(iii). The preamble of the final rule states that this criterion was to be revised to change the language "waters of the Bering Sea" to "waters of the Bering Sea and Aleutian Islands management area and adjacent waters." Comment 7 and Response, 57 *Fed. Reg.* 54936, 54938, Nov. 32, 1992. NMFS determined that this change was appropriate in order to more accurately describe the applicable area using an already defined term at 675.2 in order to eliminate confusion about the meaning of this criterion. *Id.*, at 54938. Although the preamble stated that this change would be made to the final regulatory text, the stated change was not completely made – the portion of the phrase "and adjacent waters" was omitted in the final regulatory text. Section 675.27(d)(2)(iii) in the final rule references only "the Bering Sea and Aleutian Islands management area" and does not include the reference to adjacent waters. *Id.*, at 54944. The omission could be interpreted as a decision to permit only harvests from the EEZ to count towards satisfying this criterion. However, the preamble language evidences an intent that commercial and subsistence harvests from the EEZ as well as adjacent waters, which could be interpreted to include State waters to three nautical miles, would be considered in determining whether a community met this criterion.

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[28]Although the preambles of the proposed and final rules state that the communities listed in Table 1 met the eligibility criteria (*see* 57 *Fed. Reg.* 46139, 46140 (Oct. 7, 1992); and 57 *Fed. Reg.* 54936, 54938 (Nov. 23, 1992)), King Salmon was not an ANCSA-certified native village at the time of the rulemaking. Through letter and email, the Department of Interior recently confirmed that King Salmon has not received ANCSA certification. Letter to Sally Bibb, NMFS, from Joe Labay, U.S. Department of Interior, Bureau of Land Management, dated June 8, 1999; and email to Sally Bibb from Joe Labay, dated July 22, 2003.

In November 1993, NMFS issued a final rule implementing a CDQ program for halibut and sablefish harvested with fixed gear.[29] The preamble of the proposed rule states that the communities that were eligible to apply for the pollock CDQ program are the same communities that would be eligible to apply for sablefish and halibut CDQs.[30] As for the community eligibility criteria, there were no meaningful differences between the halibut/sablefish and pollock CDQ programs except for the language of the first and third criteria. The first criterion for the halibut/sablefish CDQ program specifically stated that communities on the Chukchi Sea coast (in addition to the Gulf of Alaska) were ineligible.[31] The third eligibility criterion for the halibut/sablefish CDQ program stated that the residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters "surrounding the community," rather than in "waters of the BSAI management area," the language used in the pollock CDQ program.[32] The list of eligible communities on Table 1 for the halibut/sablefish CDQ program remained the same as those listed on Table 1 for the pollock CDQ program.[33]

In December 1995, Amendment 38 to the BSAI FMP was implemented.[34] Amendment 38 continued the western Alaska pollock CDQ program, extending it to December 31, 1998. Amendment 38 contained no changes to the criteria for community eligibility.

In February 1996, a final rule was published that moved Table 1 in Part 675 (the list of eligible communities for the pollock CDQ program) to Part 672 and renumbered it as Table 7.[35]

On June 19, 1996, NMFS issued a final rule that consolidated CDQ program regulations found at Parts 672, 675 and 676 into Part 679.[36] The consolidation combined the pollock and the

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[29]58 *Fed. Reg.* 59375, Nov. 9, 1993. The halibut/sablefish fixed gear CDQ program was codified at 50 CFR Part 676.

[30]57 *Fed. Reg.* 57130, 57142, Dec. 3, 1992.

[31]58 *Fed. Reg.* 59375, 59411, Nov. 9, 1993.

[32]*Id.*

[33]*Id.*, at 59413.

[34]A proposed rule was published on September 18, 1995 (60 *Fed. Reg*. 48087) and the final rule was published on December 12, 1995 (60 *Fed. Reg.* 63654).

[35]61 *Fed. Reg*. 5608, February 13, 1996.

[36]61 *Fed. Reg.* 31228, June 19, 1996. The preamble of the final rule states that the rule does not make any substantive changes to the existing regulations but rather "reorganizes the management measures into a more logical and cohesive order, removes duplicative and outdated provisions, and makes editorial changes for readability, clarity and to achieve uniformity in regulatory language" in response to President Clinton's Regulatory Reform Initiative. *Id.* Because the rule made only non-substantive changes to existing regulations originally issued after prior notice and opportunity for comment, NMFS waived prior notice and delayed effectiveness under 5 U.S.C. 553(b)(B) and (d). *Id.*, at 31229.

halibut/sablefish CDQ regulations into one subpart, Subpart C, which included one section with the criteria for community eligibility, section 679.30(d)(2). In doing so, some of the language that was unique to the halibut/sablefish eligibility criteria was replaced with language used in the pollock eligibility criteria. The new language, with references to changes from the halibut/sablefish eligibility criteria in brackets and bold, read as follows:

> Prior to approval of a CDP recommended by the Governor, NMFS will review the Governor's findings to determine that each community that is part of a CDP is listed in Table 7 of this part or meets the following criteria for an eligible community:
> (i) The community is located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nautical miles of the baseline of the Bering Sea. [**The halibut/sablefish CDQ program reference to the exclusion of Chukchi Sea coastal communities was removed**.]
> (ii) The community is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.
> (iii) The residents of the community conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI. [**Note that the halibut/sablefish CDQ program language of "waters surrounding the community" was not incorporated into this criterion and only the language from the pollock CDQ program remained**.]
> (iv) The community has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision.

61 *Fed. Reg.* 31228, 31265-66, June 19, 1996. No changes were made to Table 7 and the list of eligible communities with this rulemaking.

On August 12, 1996, NMFS published a final rule adding the community of Akutan to Table 7 as an eligible community and removing the language in the fourth criterion that explicitly excluded Akutan as an eligible community.[37] 61 *Fed. Reg.* 41744. The proposed rule noted that when the pollock CDQ program was implemented in 1992, NMFS determined that Akutan met the first three eligibility criteria but failed to meet the fourth because a large groundfish processing plant was located within Akutan's city limits.[38] However, the Aleutian Pribilof Island Community Development Association, a CDQ group, provided the Council and NMFS with information showing that despite the presence of the processing plant, the city of Akutan gained little benefit

[37]An additional minor change made by this rulemaking moved the statement "Other Communities That Do Not Appear on This Table May Also Be Eligible" that was within the Table into the heading for Table 7. 61 *Fed. Reg.* 41744, 41745, Aug. 12, 1996.

[38]61 *Fed. Reg.* 24475, May 15, 1996.

from it and in fact met the fourth criterion for community eligibility in the CDQ program.[39] The addition of Akutan to Table 7 resulted in 57 communities being listed as eligible to participate in the CDQ program.

On October 11, 1996, the Sustainable Fisheries Act (SFA), Pub. L. 104-297, was signed into law. Among other things, section 111 of the SFA amended the MSA at section 305(i)(1) to include specific provisions for a western Alaska CDQ Program.[40] Briefly, section 111 established a western Alaska CDQ program under which a percentage of the total allowable catch of each Bering Sea fishery is allocated to the program, set forth community eligibility criteria for participation in the CDQ program, and placed some temporary restrictions on the species and amounts that could be allocated to the CDQ program. While the MSA community eligibility criteria are similar in many respects to the regulatory criteria, they differ in some significant ways that are discussed in more detail below.

Both the House of Representatives and the Senate prepared bills to amend the MSA in the 104th Congress and both bills included provisions for the establishment of a western Alaska CDQ program. The House of Representatives' version was the Fishery Conservation and Management Amendments of 1995 (H.R. 39). The House Report (H.R REP. NO. 104-171 (1995)) that accompanied H.R. 39 explains that H.R. 39 would have codified the existing CDQ system for the Bering Sea and the existing criteria for approval as a qualified CDQ community. The House Report acknowledges that 56 communities were eligible to participate in the CDQ program at that time. The House Report also states that because of the benefits generated by the Council's and NMFS's CDQ program starting in 1992, the House Resources Committee determined that it was important to continue the CDQ program and that, in addition to pollock, sablefish and halibut, the program should be expanded to allow communities participating in the program the opportunity to harvest a percentage of the total allowable catch of each Bering Sea fishery.

The Senate bill, S. 39, was the Sustainable Fisheries Act, and the Senate bill ultimately was passed in lieu of the House bill.[41] The Senate Report (S. REP. NO. 104-276, at 26 (1996)) that accompanied S. 39 states that "New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act." The most direct reference in the Senate Report to the eligibility criteria states that the SFA "would establish community eligibility criteria that are based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs." *Id.*, at 28.

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[39] *Id.*, at 24475-76.

[40] The statutory language in the MSA for community eligibility is presented later in this memorandum in comparison form to the current regulatory text.

[41] Sustainable Fisheries Act, Pub. L. No. 104-297, 1996 U.S.C.C.A.N. (110 Stat. 3559) 4073.

In 1998, shortly after the passage of the SFA, NMFS expanded the CDQ program into a multispecies program that allocated 7.5 percent of all BSAI groundfish TACs not already covered by a CDQ program along with a pro-rata share of the prohibited species catch limit, and a graduated percentage of BSAI crab to the CDQ program.[42] While many changes were made to the CDQ program with the multispecies amendment, the community eligibility criteria continued as it had been published in the consolidation rule with the subsequent change to include Akutan – no substantive changes were made to the wording of the eligibility criteria and no changes were proposed to Table 7.[43] Neither the proposed nor the final rules included an explanation as to how the regulatory definition of eligible community compared to the MSA language at section 305(i)(1)(B) or whether the regulatory and the statutory eligibility criteria were consistent with each other. The definition of eligible community that was included in the final rule for the multispecies CDQ program is the current definition of eligible community.[44]

By letter dated March 8, 1999, the State recommended to NMFS that eight additional communities be deemed eligible for participation in the CDQ Program.[45] After reviewing the State's recommendation and supporting documentation, NMFS, by letter dated April 19, 1999, agreed with the State's recommendations and determined that the eight communities were eligible for the CDQ Program, bringing the total number of eligible communities to 65. In August 2001, NMFS proposed to add these eight communities to Table 7,[46] but withdrew the change in the final rule, stating that revisions to Table 7 would be considered by NMFS in a future rulemaking that would address a wider range of CDQ issues.[47] Despite their not being listed on Table 7, these eight communities have been considered eligible for the CDQ program since April 19, 1999.[48]

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[42]62 *Fed. Reg.* 43866, 43872, Aug. 15, 1997 (proposed rule); 63 *Fed. Reg.* 8356, Feb. 19, 1998; 63 *Fed. Reg.* 30381, 30398, June 4, 1998; and 63 *Fed. Reg.* , Oct. 1, 1998 (three final rules).

[43]With this rulemaking, the eligibility criteria in section 679.30(d)(2) were moved to the definitions section of Part 679, section 679.2, to define the term "eligible community."

[44]The regulatory language in the final rule for the Multispecies CDQ Program (i.e. the current regulatory definition of eligible community) is presented later in this memorandum in comparison form to the statutory language of the MSA.

[45]The eight additional communities are Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek.

[46]66 *Fed. Reg.* 41664, August 8, 2001.

[47]67 *Fed. Reg.* 4100, January 28, 2002.

[48]Under the current regulations, NMFS must make determinations as to whether the communities represented by the CDPs meet the eligibility criteria in 50 C.F.R. 679.2. During the application process for the 2001-2002 CDQ allocation cycle, a challenge was raised by one of the CDQ groups, questioning whether some of the communities considered eligible by the State and NMFS actually met the eligibility criteria, particularly the criterion requiring one half of a community's current commercial and subsistence fishing effort be conducted in the waters of the BSAI. For the 2001-2002 allocation cycle, NMFS stated in its decision memorandum that all 65 communities were considered eligible for the 2001-2002 allocation cycle because NMFS previously approved the

Applicable Legal Standards for Statutory Construction

Under the rules of statutory construction, the language of a statute is controlling and takes precedence over the language of an existing regulation if the regulation is not consistent with the statutory language. A statute is the charter for the administrative agency charged with implementing it.[49] A regulation issued by an agency under the authority of a particular statute therefore must be authorized by and consistent with the statute and administrative action in excess of the authority conferred by the statute is *ultra vires*.[50] Because Congress is the source of a federal administrative agency's powers, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation implementing that statute.[51] Additionally, because the legislative process culminates in an official, authoritative expression of legal standards and directives,[52] the deference typically afforded to an agency interpretation of a statute will not apply when the agency's interpretation is in conflict with a subsequently enacted legislative mandate.[53]

Prior to the SFA, the Council and NMFS interpreted the MSA as providing the authority to develop and implement the western Alaska CDQ Program, including the criteria that would be

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State's recommendations that the communities were eligible to participate in the CDQ program and no new information was presented that demonstrates ineligibility. Decision Memorandum from James W. Balsiger to Penelope D. Dalton, dated January 17, 2001.

Although none of the CDQ groups challenged the eligibility status of any of the 65 communities during the application process for the 2003-2005 CDQ allocation cycle, in accordance with its regulations, NMFS made determinations as to whether the communities represented by the CDPs met the eligibility criteria in section 679.2. During its review, NMFS concluded that 57 of the communities listed in the CDPs were eligible communities and met the requirements of 679.30(a)(1)(iv) and 679.2 by virtue of the fact that they were listed on Table 7. Letter to Jeffery W. Bush, Deputy Commissioner, Alaska Department of Community and Economic Development, From James W. Balsiger, dated January 17, 2003, Attachment 2, at 13-15. As for the eight remaining communities (those communities deemed eligible in April 1999), NMFS re-reviewed the information submitted by the State in 1999 and found that the State had applied a much broader scope than was set forth in the fishing effort criterion and had submitted information that appeared to indicate that some of the communities probably do not meet that criterion. *Id.*, at 15-16. As a result, NMFS stated that several of these eight communities may not meet all of the eligibility criteria and therefore may not be eligible to participate in the CDQ program. *Id.*, at 16. However, because NMFS lacked all of the information necessary to conclude definitively that these communities were ineligible to participate, NMFS determined that, until it can thoroughly examine all of the relevant information regarding eligibility for all communities currently listed in the CDPs, all 65 communities represented by the CDPs were deemed eligible to participate in the 2003-2005 allocation cycle. *Id.*

[49]Singer, Norman J., Sutherland Statutory Construction § 31.02 (5th ed. 1992).

[50]*Id*.

[51]*Id.*

[52]*Id.*, at § 27.01.

[53]*Id.*, at § 31.06.

considered for community participation. Congress acknowledged the existence of this authority in the legislative history for the SFA. S. REP. NO. 104-276, at 27. In October 1996, when the MSA was amended, Congress spoke to the issue of community eligibility and provided definable boundaries for community participation in the CDQ program. And although Congress stated in the legislative history that the SFA would establish community eligibility criteria that are based upon those previously developed by the Council and NMFS, Congress did not use language that is identical to the regulatory eligibility criteria. Based on the rules of statutory construction outlined above, the eligibility criteria set forth in the MSA control and take precedence over the regulatory criteria set forth in 50 C.F.R. § 679.2 to the extent there is any conflict between the statutory and regulatory language. Additionally, because Congress has now specifically addressed the issue of community eligibility for the CDQ Program, NMFS's previous interpretation of the MSA as providing the Council and agency the ability to implement eligibility criteria consistent with the general provisions of the MSA cannot be maintained to the extent that the regulatory criteria are in conflict with the statutory language of the MSA.

When there is a question concerning the interpretation of a statute, several principles of law are applied and considered in order to interpret the statute's meaning. These principles are known as the rules of statutory construction. One of the guiding principles of statutory interpretation is that when the language of the statute is clear and unambiguous and not unreasonable or illogical in its operation, a court may not go outside the statute to give it meaning.[54] This is known as the plain meaning rule. Only statutes that are ambiguous are subject to the process of statutory interpretation.[55] Ambiguity exists when a statute is capable of being understood by reasonably well informed persons in two or more different senses.[56] Even if a specific provision is clearly worded, ambiguity can exist if some other section of the statutory program expands or restricts the provision's meaning, if the plain meaning of the provision is repugnant to the general purview of the act, or if the provision when considered in conjunction with other provisions of

[54]Singer, Norman J., Sutherland Statutory Construction § 46:01(6th ed. 2000).

[55]*Id.*

[56]*Id.*, at § 46:04.

the statutory program, or with the legislative history of the subject matter, import a different meaning.[57]

Interpretation of the MSA eligibility criteria and determinations as to whether the regulatory language is inconsistent or in conflict with the statutory language

This section of the memorandum provides a legal interpretation of the MSA eligibility criteria as well as a comparison of the statutory and regulatory language to determine whether inconsistencies or conflicts exist between the two texts. This is presented in a paragraph-by-paragraph format.

The following is a side-by-side comparison of the regulatory[58] and statutory text:

Regulatory text at 50 C.F.R. 679.2	Statutory text at 16 U.S.C. 1855(i)(1)(B)
Eligible community means a community that is listed in Table 7 to this part or that meets all of the following requirements:	To be eligible to participate in the western Alaska community development quota program under subparagraph (A) a community shall – **[this introductory text makes no reference to or incorporation of Table 7 or the communities listed on it; each community must meet all of following the eligibility criteria in order to participate in the CDQ Program]**
(1) The community is located within 50 nm from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the most western of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nm of the baseline of the Bering Sea.	(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea **[substantively identical to the regulatory language];**
	(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean [**substantively identical to the regulatory language at 679.2 although it omits the regulatory clarification that even if a community is within 50 nm of the baseline of the Bering Sea, it is not eligible if it is located on the GOA coast of the North Pacific Ocean**];

[57] *Id.*, at § 46:01.

[58] The regulatory text displayed in this comparison is the current regulatory language. It is also substantively identical to the regulatory language that existed at the time of passage of the SFA.

Regulatory text at 50 C.F.R. 679.2 (con't)	Statutory text at 16 U.S.C. 1855(i)(1)(B) (con't)
	(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register **[criterion not within the regulatory language]**;
(2) That is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.	(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village [**substantively identical to the regulatory language**];
(3) Whose residents conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI.	(v) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands **[statutory language does not use the term BSAI but instead uses the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"]**; and
(4) That has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The community of Unalaska is excluded under this provision.	(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments [**statutory language does not use the term BSAI but instead uses the term Bering Sea**; **also omits the specific exclusion of Unalaska from the CDQ program]**.

Statutory criteria addressing geographical location, ANCSA certification, and consistency with regulatory provisions

The statutory language used in paragraphs 305(i)(1)(B)(i) and (ii) (dealing with geographical location), and paragraph (iv) (requiring ANCSA certification) is clear and unambiguous and there is no need for interpretation. Furthermore, the language used in these paragraphs is substantively identical to the first and second eligibility criteria within the regulatory definition of eligible community at 679.2. Paragraph 305(i)(1)(B)(iii) is not included in the regulatory definition but contains clear and unambiguous language and merely requires communities to meet the regulatory criteria. Based on this comparison, no inconsistencies or conflicts between the statutory and the regulatory language appear to exist for these paragraphs and therefore no changes to the regulatory language are required to make it consistent with the statutory language.

Mandatory nature of statutory criteria and lack of statutory reference to Table 7

Under the rules of statutory construction, use of the word "shall" (except in its future tense)

typically indicates a mandatory intent.[59] The introductory language of section 305(i)(1)(B) clearly and unambiguously indicates that a community shall satisfy all of the criteria in order to be eligible. There is no permissive language within the section that would allow the waiver of one or more of the criteria, nor is there language that would recognize some other form of eligibility, such as a grandfather clause. Because the Council and NMFS may only develop regulations that are authorized by and consistent with the statute, the Council and NMFS do not have any discretion to implement or maintain regulations that omit, add, or modify any of the MSA community eligibility requirements. Therefore, only communities that meet all of the MSA eligibility criteria can participate in the CDQ program.

As explained earlier, the ability to be determined an eligible community under the regulations creates an either/or situation – a community can be eligible because it meets all of the regulatory eligibility criteria or it can be eligible by virtue of its listing on Table 7. In other words, under NMFS regulations, a community can participate in the CDQ program even if the community does not meet all of the regulatory eligibility criteria as long as it is listed on Table 7. Because the statute mandates consistency with each eligibility criterion and does not provide an alternative, the lack of statutory reference to Table 7 creates a discrepancy between the statute and the regulations. However, the discrepancy is problematic only if there are communities listed on Table 7 that do not meet all of the statutory criteria. At this time, there is at least one community, King Salmon, that does not meet all of the statutory eligibility criteria. Because Table 7 lists at least one community that does not meet all of the statutory eligibility criteria, NMFS regulations with respect to eligibility through listing on Table 7 are *ultra vires* and Table 7 must be amended to include only those communities that meet all of the MSA eligibility criteria.

Statutory criterion addressing commercial or subsistence fishing effort

MSA section 305(i)(1)(B)(v) requires eligible communities to "consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands." There are two points of interpretation necessary with this criterion. The first point deals with determining from where must commercial or subsistence fishing effort have come in order to satisfy the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands." The second point deals with when must commercial or subsistence fishing effort have occurred in order to satisfy the word "current."

[59]Singer, Norman J., Sutherland Statutory Construction § 25.04 (5th ed. 1992).

1. Interpretation of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"

Although the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" is not defined within the MSA, a plain reading of the phrase indicates that the area encompasses all State and Federal waters of the Bering Sea or waters surrounding the Aleutian Islands. While the MSA is focused on the regulation of fishing activities conducted in the exclusive economic zone (EEZ), which, in the case of Alaska, begins at 3 nautical miles from the baseline of the territorial sea and extends seaward to 200 nautical miles, Congress did not include the term "EEZ" in the statutory text of this criterion.[60] Congress is well aware of and familiar with the term "EEZ" and its meaning, and uses the term elsewhere in the MSA. Its omission in this criterion coupled with the plain language reading of the phrase argues in favor of an inclusive reading of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" as meaning State as well as Federal waters.[61]

Furthermore, Congress clearly intended both subsistence harvests and commercial harvests to qualify in satisfying this criterion.[62] As explained below, because subsistence harvests cannot come from the EEZ, in order to give meaning to all of the words in this criterion, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must include harvests from both State and Federal waters.

Subsistence rights can exist under common law through the establishment of exclusive aboriginal title or non-exclusive aboriginal rights, or they can be conferred by statute. In order for fishing or hunting to be considered a subsistence activity, aboriginal title to an area or non-exclusive aboriginal rights over an area must be established, or a statute must recognize the activity as subsistence. Several court cases have ruled on the question of whether native villages can assert exclusive aboriginal title or non-exclusive aboriginal rights under common law or statutory rights in the fishery resources of the EEZ off Alaska. The first of these is *Amoco Production Co. v.*

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[60]The legislative history includes a reference to harvests within the EEZ for this criterion. In the Senate Report, there is the following sentence: "New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act." (Emphasis added.) S. REP. NO. 104-276, at 26 (1996). Although Congress references historic harvests from the EEZ, it is unlikely that Congress meant only harvests from the EEZ. This is based on the discussion above and also other references in the legislative history that indicate the CDQ program is to be administered as it has been by the Council and NMFS, which means historic harvests from State as well as Federal waters would be considered in satisfying this criterion.

[61]"While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." Singer, Norman J., Sutherland Statutory Construction § 46:06 (6th ed. 2000).

[62]It is important to note that fishing effort in this criterion is not limited to groundfish fishing and includes other species of fish, such as halibut and salmon.

Village of Gambell, 480 U.S. 531, 546-48 (1987).[63] In *Amoco*, the Supreme Court held that Title 8 of the Alaska National Interest Lands Conservation Act (ANILCA), which statutorily recognized Alaska natives' use of public lands for subsistence hunting and fishing, did not apply to the Outer Continental Shelf (OCS) because ANILCA defines public lands to mean federal lands situated "in Alaska" which includes coastal waters to a point three miles from the coastline, where the OCS commences, but does not include waters seaward of that point.[64] In *Native Village of Eyak v. Trawler Diane Marie* (*Eyak I*), 154 F.3d 1090, 1092 (9th Cir. 1998), the court held that federal paramountcy precluded aboriginal title in the OCS.[65] And finally, in *Native Village of Eyak v. Evans (Eyak II)*, No. A98-0365-CV (HRH) (D. Alaska, September 25, 2002), the court held that non-exclusive aboriginal rights could not exist in the OCS due to federal paramountcy and the holding in the *Eyak I* case.[66]

As a result of these holdings, subsistence harvest cannot be considered to come from the EEZ. Because commercial or subsistence harvests can be used to qualify a community for the CDQ

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[63]In this case, the Alaska native villages of Gambell and Stebbins challenged an OCS lease sale, claiming that under ANILCA the OCS was public land within Alaska, the sale would have adversely affected their aboriginal rights to hunt and fish on the OCS, and that the Secretary of the Interior had failed to comply with section 810(a) of ANILCA which provides protection for natural resources used for subsistence in Alaska. *Amoco*, at 534-35. An earlier decision by the Ninth Circuit had held that the phrase "in Alaska" in section 810(a) was ambiguous and interpreted it to include the OCS. People of Gambell v. Clark, 746 F. 2d 572, 575 (1984).

[64]The MSA defines "EEZ" as "the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States." 16 U.S.C. 1802(11). In *Amoco*, the Supreme Court found that the Submerged Lands Act, 43 U.S.C. § 1312, was made applicable to the State of Alaska under the Alaska Statehood Act and that under section 4 of the Submerged Lands Act, the seaward boundary of a coastal State extends to a line three miles from its coastline and at that line, the OCS commences. *Amoco*, at 547. Therefore, the seaward boundary of the State of Alaska is three nautical miles from its coastline. As such, both the EEZ and OCS start at the same point off the coast of Alaska and for purposes of this discussion, the conclusions reached in these cases regarding the OCS are applicable to the EEZ.

[65]In this case, several Alaska native villages challenged the halibut and sablefish IFQ regulations promulgated by the Secretary of Commerce as violating their rights to the exclusive use and occupancy of the Outer Continental Shelf (OCS). The villages claimed that for more than 7,000 years their members have hunted sea mammals and harvested the fishery resources of the OCS and argued that they are entitled to exclusive use and occupancy of their respective areas of the OCS, including exclusive hunting and fishing rights, based upon unextinguished aboriginal title.

[66]*Eyak II* considered whether non-exclusive hunting and fishing rights on the OCS are legally different from exclusive hunting and fishing rights based on aboriginal title which were precluded by the court in *Eyak I*. Finding that there is no difference between an exclusive claim to hunt and fish in the OSC and a non-exclusive claim when it comes to the doctrine of federal paramountcy, the *Eyak II* court held that since the MSA's passage in 1976, the United States has asserted sovereign rights and exclusive fishery management authority over all fish and continental shelf fishery resources within the EEZ and that the plaintiffs' claims of non-exclusive aboriginal rights in the OCS conflicted with the U.S. assertion and were inconsistent with the paramount rights of the federal government in areas of the ocean beyond the three-mile limit of state jurisdiction. 12-13, 36. The district court decision in *Eyak II* currently is on appeal to the Ninth Circuit.

program, to interpret the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" as only applying to the EEZ would make ineligible any subsistence harvests by the communities. Such an interpretation would ignore or fail to give meaning to all the words used in the criterion and would be contrary to the rules of statutory construction.[67] Therefore, in order to give full meaning to the language of this criterion, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must be interpreted to mean State or Federal waters of the Bering Sea or Aleutian Islands.

Given this interpretation, is the regulatory language consistent with this statutory criterion regarding the location of qualifying harvests? There are two regulatory definitions of "BSAI," one for purposes of the commercial king and Tanner crab fisheries, the other for purposes of the groundfish fisheries. 50 C.F.R. 679.2. Both refer only to waters of the EEZ.[68] Given the statutory interpretation above, an inconsistency exists between the statutory and regulatory texts and the regulatory text should be amended to conform with the statutory language. Although this discrepancy exists between the two texts, in practice, NMFS may have applied this criterion as mandated by the MSA language. Recall that earlier in this memorandum it was noted that for both the original pollock CDQ final rule in November 1992 and the halibut/sablefish CDQ final rule in November 1993, commercial or subsistence harvests from Federal or State waters may have been used to determine community eligibility. *See* discussion *infra* on pages 4-5. In order to determine whether all appropriate Federal and State waters commercial or subsistence harvests were considered in a community's eligibility evaluation, NMFS should re-examine the information submitted for currently eligible communities for consistency with this MSA criterion.[69]

2. Interpretation of the term "current"

The second point of interpretation with this criterion deals with when must commercial or subsistence harvests have occurred in order to satisfy the criterion given the use of the word "current." The term "current" appeared in the original language for the pollock CDQ program in 1992 and has been interpreted by NMFS to mean the level of a community's commercial or subsistence harvests at the time of initial evaluation for eligibility. If a community's harvests satisfied this criterion at the time of initial evaluation, then the community was determined to have

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[67]"No clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found that will give force to and preserve all the words of the statute." Singer, Norman J., Sutherland Statutory Construction § 46:06 (6th ed. 2000).

[68]For King and Tanner crab, "BSAI Area" is defined as "those waters of the EEZ off the west coast of Alaska lying south of Point Hope (68 degrees 21' N. lat.), and extending south of the Aleutian Islands for 200 nm west of Scotch Cap Light (164 degrees 44'36" W. long). For groundfish fisheries, "BSAI management area" is defined as "the Bering Sea and Aleutian Islands subareas . . . ." Both subareas are defined as those portions of the EEZ contained within identified statistical areas. 50 C.F.R. § 679.2

[69]It is important to note that a community's commercial or subsistence fishing effort in State or Federal waters south of the Aleutian Islands would also qualify under this criterion given the statutory reference to waters surrounding the Aleutian Islands.

satisfied this criterion and no subsequent consideration of a community's harvests was required by NMFS.

The statutory language at 305(i)(1)(B)(v) also uses the term "current" to describe commercial or subsistence harvests. The term is not defined in the MSA and it is subject to several different interpretations. Three possible interpretations are:

> (1) harvests as of the date the SFA was enacted – *i.e.,* on October 11, 1996, more than half of a community's commercial or subsistence harvests must have been from the waters of the Bering Sea or waters surrounding the Aleutian Islands;
> (2) harvests at any given time – *i.e.,* a community must have harvests that would satisfy this criterion at every evaluation period in order to remain an eligible community; or
> (3) harvests that, at the time of initial evaluation for eligibility, satisfy this criterion – *i.e.,* a community would only have to satisfy this criterion at the time it was or is initially considered for eligibility and, once determined to be an eligible community, would thereinafter satisfy this criterion.

In this situation, agencies are permitted to develop a reasonable interpretation of a term.[70] Because the term is ambiguous, the rules of statutory construction permit the use of intrinsic and extrinsic aids in developing an interpretation.[71] For this particular term, there are no intrinsic aids that help illuminate the word's meaning. As for the legislative history, there is nothing that directly assists with an interpretation of the term "current," although there are statements within the legislative history that describe the section as codifying the existing regulatory eligibility criteria, acknowledge that there were 56 communities eligible to participate in the CDQ program at the time of passage of the SFA, and that indicate Congress wanted the communities currently participating in the CDQ Program to continue to be participating communities.[72]

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[70] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (holding that if statute is silent or ambiguous with respect to specific issue, agency's interpretation of statute must be upheld if agency's construction of statute is permissible and not arbitrary, capricious, or "manifestly contrary to the statute").

[71] Intrinsic aids are found within the text of the statute such as the use of context, definition sections, punctuation, etc. Singer, Norman J., Sutherland Statutory Construction § 47:01(6th ed. 2000). Extrinsic aids are sources outside the text of the statute and include the legislative history of a statute, such as committee reports, floor statements, etc. *Id.*, at § 48:01.

[72] H.R. REP. NO. 104-171, at section 14 (1995); S. REP. NO. 104-276, at 28 (1996). Representative Young stated that "The enactment of section 111(a) of S. 39 will provide the North Pacific Fishery Management Council and the Secretary of Commerce the statutory tools required to improve the efficiency of their implementation of the western Alaska community development quota program. And the enactment of section 111(a) will codify Congress strong support for the council and the Secretary's innovative effort to provide fishermen and other residents of Native villages on the coast of the Bering Sea a fair and equitable opportunity to participate in Bering Sea fisheries that prior to the creation of the western Alaska community development quota program was long overdue." CONG. REC. H11418, H11438 (daily ed. Sept. 27, 1996) (statement of Rep. Young).

Since the addition of eligibility criteria to the MSA in October 1996, NMFS appears to have continued its interpretation of the regulatory definition of the term "current" and applied that interpretation to the statutory term with its implementation of the multispecies CDQ program in 1998 and its approval of the eight additional communities in April 1999. As described earlier, the multispecies CDQ program did not change the regulatory eligibility criteria or the communities listed on Table 7. NMFS did not re-evaluate the eligibility of each community for consistency with the current harvests criterion but rather continued with its pre-SFA interpretation that current harvests meant harvests at the time of a community's initial evaluation for eligibility. Similarly, with NMFS's approval of the eight additional communities in 1999, NMFS evaluated a community's harvests as of the time of initial evaluation for eligibility (*i.e.*, 1999) and did not just look at harvests as of October 1996. Also, during the last two CDQ allocation cycles, NMFS has not evaluated a community's commercial or subsistence harvests to determine the community's continuing eligibility. NMFS's continuation of its pre-SFA interpretation of the term "current" since the passage of section 305(i)(1)(B)(v) implies an interpretation of the statutory word "current" that eliminates the first and second possible interpretations of the term.

Because the statutory language is ambiguous with regards to the meaning of the term "current" in 305(i)(1)(B)(v), NMFS was permitted to develop a reasonable interpretation of the term. It appears from actions taken by NMFS subsequent to the passage of section 305(i)(1)(B)(v) that NMFS has applied its past regulatory interpretation. Because the interpretation is within the agency's authority under the MSA, is a logical way to define the term, and appears consistent with the few Congressional statements included within the legislative history regarding this aspect of the criteria, NMFS's interpretation is a reasonable interpretation of the term "current." Because the regulatory language is similar to the statutory language and because the agency's interpretation is reasonable, the regulation is consistent with the statutory provision regarding the term "current" in 305(i)(1)(B)(v) and no changes to the regulations are needed.

Statutory criterion prohibiting previously developed harvesting or processing capability

MSA section 305(i)(1)(B)(vi) excludes communities from the CDQ program that have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries of the Bering Sea. The language of this criterion is almost identical to that in the regulations, two differences being that (1) the statutory language references Bering Sea whereas the regulatory language references groundfish fisheries participation in the BSAI, and (2) the regulatory language specifically excludes Unalaska from participation in the CDQ program under this criterion.

The statutory language is relatively clear and unambiguous[73] and includes State and Federal waters that are considered within the Bering Sea. Aside from the non-substantive discrepancy regarding the specific exclusion of Unalaska, the only discrepancy between the statutory and regulatory texts is the lack of identical language regarding the geographical reference. However, the visual discrepancy does not amount to a substantive difference between the two texts because the statutory term "Bering Sea" includes waters directly north of the Aleutian Islands. Due to the FMP management area divisions between the Bering Sea and the Aleutian Islands, the regulatory text must reference both areas in order to encompass the same area. Therefore, there are no inconsistencies between the statutory and regulatory text and no changes to the regulatory text are necessary.

Status of the eight communities deemed eligible in 1999

As described above, upon recommendation of the State, NMFS determined in April 1999 that eight additional communities were eligible to participate in the CDQ program. Although the language of section 305(i)(1)(B) makes no reference to limiting the number of eligible communities to those that were participating at the time the MSA was enacted, there is a reference in the legislative history to this effect. In the Senate Report accompanying the SFA, there is the following sentence: "The subsection also would establish community eligibility criteria that are based upon those previously developed by the North Pacific Fishery Management Council and the Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs. (Emphasis added)"[74]

You have specifically asked whether this language in the Senate Report must be interpreted as limiting the opportunity to participate in the CDQ program to only those communities that participated in October 1996, thus excluding the eight additional communities that were not deemed eligible until 1999. We are of the opinion that such an interpretation would be contrary to the plain language of the statute. The language at section 305(i)(1)(B) clearly states that any community that meets the eligibility criteria set forth in subparagraphs (i) through (vi) is an eligible community for purposes of the western Alaska CDQ program. Furthermore, the section includes no words that could be construed as limiting participation to only a subgroup of communities that meet those criteria. Therefore, the eight communities determined to be eligible in April 1999 may continue to participate in the western Alaska CDQ program as long as they meet the eligibility criteria set forth in section 305(i)(1)(B). Given the concerns previously expressed by NMFS as to whether these communities do in fact meet the criteria, the eligibility

[73]The term "substantial" in this criterion could be considered ambiguous. However, aside from the geographic reference discrepancy, there are no meaningful differences between the statutory and regulatory language and no statements in the legislative history to indicate that the statutory language is meant to be interpreted or applied in a manner different from the State's and NMFS's previous interpretation and application.

[74]S. REP NO. 104-297, at 28.

of these eight communities should be re-examined in light of the MSA criteria and the legal interpretations provided above.

Conclusions

In your memorandum, you state that NMFS prefers an interpretation of the MSA that would allow the agency to revise the regulations to be consistent with the MSA, but would not require the agency to re-evaluate the eligibility status of the 57 communities determined to be eligible through rulemaking approved and implemented prior to the MSA amendments. Such an interpretation would require the determination that the MSA criteria for community eligibility in the CDQ program are not substantively different from the regulatory criteria contained within the definition of eligible community at 50 C.F.R. 679.2. Based on the foregoing legal analysis, such an approach is not supported.

To summarize the foregoing legal opinions:

– no regulatory change is necessary to the introductory text of the definition of eligible community; however, all communities listed on Table 7 must be communities that have been determined to satisfy all the statutory eligibility criteria.
– no regulatory changes are needed to paragraphs 1 or 2 of the definition of eligible community.
– the regulatory language in paragraph 3 of the definition of eligible community should be amended to clarify that commercial or subsistence fishing effort from State or Federal waters of the Bering Sea or waters surrounding the Aleutian Islands will be considered under this criterion. No other regulatory changes to this paragraph are needed although it is recommended that NMFS clarify its interpretation of the term "current" in this paragraph.
– no regulatory change is needed to paragraph 4 of the definition of eligible community.
– regulatory changes are needed to Table 7 such that only communities that meet all of the statutory criteria are listed in Table 7.
– the eligibility status of all 65 communities currently eligible to participate in the CDQ program should be re-examined in light of this legal opinion to determine whether each community meets all of the statutory eligibility criteria.
– under the MSA, there is no date by which a community must be deemed eligible in order to participate in the CDQ program, and any community that meets the statutory eligibility criteria is eligible to participate in the western Alaska CDQ program.

cc: Jane Chalmers
GCF
Sally Bibb

Attachment 2

104-297 Magnuson-Stevens Act Section 305

(i) ALASKA AND WESTERN PACIFIC COMMUNITY DEVELOPMENT PROGRAMS.--

(1) (A) The North Pacific Council and the Secretary shall establish a western Alaska community development quota program under which a percentage of the total allowable catch of any Bering Sea fishery is allocated to the program.

(B) To be eligible to participate in the western Alaska community development quota program under subparagraph (A) a community shall--

(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to
the western most of the Aleutian Islands, or on an island within the Bering Sea;

(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean;

(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;

(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village;

(v) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding
the Aleutian Islands; and

(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless
the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from
previous investments.

©) (i) Prior to October 1, 2001, the North Pacific Council may not submit to the Secretary any fishery management plan, plan amendment, or regulation that allocates to the western Alaska community development quota program a percentage of the total allowable catch of any Bering Sea fishery for which, prior to October 1, 1995, the Council had not approved a percentage of the total allowable catch for allocation to such community development quota program. The expiration of any plan, amendment, or regulation that meets the requirements of clause (ii) prior to October 1, 2001, shall not be construed to prohibit the Council from submitting a revision or extension of such plan, amendment, or regulation to the Secretary if such revision or extension complies with the other requirements of this paragraph.

(ii) With respect to a fishery management plan, plan amendment, or regulation for a Bering Sea fishery that--

(I) allocates to the western Alaska community development quota program a percentage of the total

allowable catch of such fishery; and

(II) was approved by the North Pacific Council prior to October 1, 1995; the Secretary shall, except as provided in clause (iii) and after approval of such plan, amendment, or regulation under section 304, allocate to the program the percentage of the total allowable catch described in such plan, amendment, or regulation. Prior to October 1, 2001, the percentage submitted by the Council and approved by the Secretary for any such plan, amendment, or regulation shall be no greater than the percentage approved by the Council for such fishery prior to October 1, 1995.

(iii) The Secretary shall phase in the percentage for community development quotas approved in 1995 by the North Pacific Council for the Bering Sea crab fisheries
as follows:

(I) 3.5 percent of the total allowable catch of each such fishery for 1998 shall be allocated to the western Alaska community development quota program;

(II) 5 percent of the total allowable catch of each such fishery for 1999 shall be allocated to the western Alaska community development quota program; and

(III) 7.5 percent of the total allowable catch of each such fishery for 2000 and thereafter shall be allocated to the western Alaska community development quota program, unless the North Pacific Council submits and the Secretary approves a percentage that is no greater than 7.5 percent of the total allowable catch of each
such fishery for 2001 or the North Pacific Council submits and the Secretary approves any other percentage on or after October 1, 2001.

(D) This paragraph shall not be construed to require the North Pacific Council to resubmit, or the Secretary to reapprove, any fishery management plan or plan amendment approved by the North Pacific Council prior to October 1, 1995, that includes a community development quota program, or any regulations to implement such plan or amendment.

(2) (A) The Western Pacific Council and the Secretary may establish a western Pacific community development program for any fishery under the authority of such Council in order to provide access to such fishery for western Pacific communities that participate in the program.

(B) To be eligible to participate in the western Pacific community development program, a community shall--

(i) be located within the Western Pacific Regional Fishery Management Area;

(ii) meet criteria developed by the Western Pacific Council, approved by the Secretary and published in the Federal Register;

(iii) consist of community residents who are descended from the aboriginal people indigenous to the area who conducted commercial or subsistence fishing using
traditional fishing practices in the waters of the Western Pacific region;

(iv) not have previously developed harvesting or processing capability sufficient to support substantial participation in fisheries in the Western Pacific Regional Fishery Management Area; and

(v) develop and submit a Community Development Plan to the Western Pacific Council and the Secretary.

(C) In developing the criteria for eligible communities under subparagraph (B)(ii), the Western Pacific Council shall base such criteria on traditional fishing practices in or dependence on the fishery, the cultural and social framework relevant to the fishery, and economic barriers to access to the fishery.

(D) For the purposes of this subsection "Western Pacific Regional Fishery Management Area" means the area under the jurisdiction of the Western Pacific Council, or an island within such area.

(E) Notwithstanding any other provision of this Act, the Western Pacific Council shall take into account traditional indigenous fishing practices in preparing any fishery management plan.

(3) The Secretary shall deduct from any fees collected from a community development quota program under section 304(d)(2) the costs incurred by participants in the program for observer and reporting requirements which are in addition to observer and reporting requirements of other participants in the fishery in which the
allocation to such program has been made.

(4) After the date of enactment of the Sustainable Fisheries Act, the North Pacific Council and Western Pacific Council may not submit to the Secretary a community development quota program that is not in compliance with this subsection.

Attachment 3

Communities Determined Eligible for the CDQ Program by NMFS through Rulemaking in 1992 and Administrative Determination in 1999

APICDA (6)	**Pop.**
Akutan	713
Atka	92
False Pass	64
Nelson Lagoon	83
Nikolski	39
Saint George	152
TOTAL	**1,143**

BBEDC (17)	**Pop.**
Aleknagik	221
Clark's Point	75
Dillingham	2,466
Egegik	116
Ekuk	2
Ekwok*	130
King Salmon/Savonoski	442
Levelok*	122
Manokotak	399
Naknek	678
Pilot Point	100
Port Heiden	119
Portage Creek*	36
South Naknek	137
Togiak	809
Twin Hills	69
Ugashik	11
TOTAL	**5,932**

CBSFA (1)	**Pop.**
Saint Paul	**532**

CVRF (20)	**Pop.**
Chefornak	394
Chevak	765
Eek	280
Goodnews Bay	230
Hooper Bay	1,014
Kipnuk	644
Kongiganak	359
Kwigillingok	338
Mekoryuk	210
Napakiak*	353
Napaskiak*	390
Newtok	321
Nightmute	208
Oscarville*	61
Platinum	41
Quinhagak	555
Scammon Bay	465
Toksook Bay	532
Tuntutuliak	370
Tununak	325
TOTAL	**7,855**

NSEDC (15)	**Pop.**
Brevig Mission	276
Diomede	146
Elim	313
Gambell	649
Golovin	144
Koyuk	297
Nome	3,505
Saint Michael	368
Savoonga	643
Shaktoolik	230
Stebbins	547
Teller	268
Unalakleet	747
Wales	152
White Mountain	203
TOTAL	**8,488**

YDFDA (6)	**Pop.**
Alakanuk	652
Emmonak	767
Grayling*	194
Kotlik	591
Mountain Village*	755
Nunam Iqua	164
TOTAL	**3,123**

Total population of 65 CDQ communities (based on 2000 U.S. census) = 27,073

***Communities added to the CDQ Program in 1999**

Attachment 4

BSAI FMP Proposed Changes
DRAFT - September 15, 2003

Strike-outs would be removed from the FMP. **Bold** italicized text would be added to the FMP.

13.4.7.3 COMMUNITY DEVELOPMENT QUOTAS

I. PURPOSE AND SCOPE. The Western Alaska Community Development Quota Program is established to provide fishermen who reside in western Alaska communities a fair and reasonable opportunity to participate in the Bering Sea/Aleutian Islands groundfish fisheries, to expand their participation in salmon, herring, and other nearshore fisheries, and to help alleviate the growing social economic crisis within these communities. Residents of western Alaska communities are predominantly Alaska Natives who have traditionally depended upon the marine resources of the Bering Sea for their economic and cultural well-being. The Western Alaska Community Development Quota Program is a joint program of the Secretary and the Governor of the State of Alaska. Through the creation and implementation of community development plans, western Alaska communities will be able to diversify their local economies, provide community residents with new opportunities to obtain stable, long-term employment, and participate in the Bering Sea/Aleutian Islands fisheries which have been foreclosed to them because of the high capital investment needed to enter the fishery.

The NMFS Regional Director shall hold the designated percent of the annual total allowable catch (TAC) of groundfish for each management area in the Bering Sea and Aleutian Islands for the western Alaska community quota as noted below. These amounts shall be released to ***qualified applicants representing*** eligible Alaska communities who submit a plan, approved by the Governor of Alaska, for its wise and appropriate use. Not more than 33 percent of the total Western Alaska community quota may be designated for a single CDQ applicant, except that if portions of the total quota are not designated by the end of the second quarter, applicants may apply for any portion of the remaining quota for the remainder of that year only.

The Western Alaska Community ***Development*** Quota program will be structured such that the Governor of Alaska is authorized to recommend to the Secretary that a Bering Sea Rim community be designated as an eligible fishing community to ***participate in the program.*** ~~receive a portion of the reserve.~~ To be eligible a community must meet the specified criteria ~~and have~~ developed ~~a fisheries development plan approved~~ by the Governor of Alaska, ***approved by the Secretary, and published in the Federal Register.*** The Governor shall develop ~~such recommendations in consultation with the Council. The Governor shall~~ ***and*** forward any such recommendations to the Secretary, following consultation with the Council. Upon receipt of such recommendations, the Secretary may designate a community as an eligible fishing community and, under the plan, may release appropriate portions of the reserve ***to qualified applicants representing eligible communities.***

Attachment 4

13.4.7.3.2 ELIGIBLE WESTERN ALASKA COMMUNITIES.

The Governor of Alaska is authorized to recommend to the Secretary that a community within western Alaska which meets all of the following criteria be eligible for the Western Alaska Community ***Development*** Quota Program (hereinafter "the Program"):

(1) be located within 50 nm from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea;

(2) not be located on the Gulf of Alaska coast of the north Pacific Ocean;

(3) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;

(4) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village;

(5) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands; and

(6) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments.

~~(1) be located on or proximate to the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands or a community located on an island within the Bering Sea, that the Secretary of the Interior has certified pursuant to section 11(b)(2) or (3) of Pub. L. No. 92-203 as Native villages are defined in section 3©) of Pub. L. No. 92-203;~~

~~(2) be unlikely to be able to attract and develop economic activity other than commercial fishing that would provide a substantial source of employment;~~

~~(3) its residents have traditionally engaged in and depended upon fishing in the waters of the Bering Sea coast;~~

~~(4) has not previously developed harvesting or processing capability sufficient to support substantial participation in the commercial groundfish fisheries of the Bering Sea/Aleutian Islands because of a lack of sufficient funds for investing in harvesting or processing equipment; and~~

~~(5) has developed a community development plan approved by the Governor, after~~

~~consultation with the North Pacific Fishery Management Council.~~

~~Also, Akutan will be included in the list of eligible CDQ communities.~~

13.4.7.3.3 Fixed Gear Sablefish CDQ Allocation

The NMFS Regional Director shall hold 20 percent of the annual fixed-gear Total Allowable Catch of sablefish for each management area in the Bering Sea/Aleutian Islands Area for the western Alaska sablefish community quota. The portions of sablefish TACs for each management area not designated to CDQ fisheries will be allocated as QS and IFQs and shall be used pursuant to the program outlined in Section 13.4.7.1.

13.4.7.3.4 Pollock CDQ Allocation

For a Western Alaska Community Quota, 50% of the BSAI pollock reserve as prescribed in the FMP will be held annually. This held reserve shall be released to communities on the Bering Sea Coast which submit a plan, approved by the Governor of Alaska, for the wise and appropriate use of the released reserve.

13.4.7.3.5 Multispecies Groundfish and Prohibited Species CDQ Allocations

CDQs will be issued for 7.5% of the TAC for all BSAI groundfish species not already covered by another CDQ program (pollock and longline sablefish). A pro-rata share of PSC species will also be issued. PSC will be allocated before the trawl/non-trawl splits. The program will be patterned after the pollock CDQ program, but will not contain a sunset provision.

Attachment 4